



Tonga

CABINET MANUAL OF HIS MAJESTY'S CABINET

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PART 1 - INTRODUCTION

1. This Cabinet Manual of His Majesty's Cabinet ('Cabinet') sets out how the Cabinet operates and how it connects with all other parts of government.

This version of the Cabinet Manual builds on previous drafts of the Manual and related discussions, and on other source documents and information (for example on how Cabinet operates currently), the Constitution and the laws of the Kingdom. As is common with Cabinet Manuals, this one includes background information and guidance on the operation of government in Tonga, under the Constitution and laws.

The Manual is in nine Parts. It begins with an introduction explaining its importance, then Part 2 outlines very briefly the roles and functions of the King, Cabinet and Ministers. Part 3 discusses the constitutional and legal framework within which Cabinet operates, including the established conventions and principles that apply to its position and work. The following five Parts deal with particular aspects of the duties of Cabinet and Ministers in relation to - 4 Cabinet responsibility, 5 Cabinet decision-making, 6 financial matters, 7 legislation, 8 the administration of justice, and Part 9 focuses on issues related to a transition of Government.

2. Administrative arrangements in this Manual may be changed by Cabinet but care should be taken that any changes are in accord with the Constitution and the laws. Before changing the Manual, Cabinet should consult and discuss with those who are most affected by it, including the following:
 - Ministers;
 - the Public Service Commission;

- the Cabinet Office;
 - Crown Law; and
 - Chief Executive Officers, and other Public Servants, especially at senior level.
3. Cabinet is the centre of the “management of government”. Its relationships with the other parts of government are both practical and constitutional. There is a 19th century metaphor that has endured in all parliamentary systems, which says that Cabinet is the “buckle that binds”.¹ The “buckle that binds” metaphor applies to the way that Cabinet connects:
 - the Legislature with the Monarch;
 - the Public Service with the Monarch;
 - the Public Service with the Legislature;
 - the Judiciary with the Monarch; and
 - the people and the Kingdom of Tonga with the outside world under international law.
 4. This connecting role of Cabinet in the governmental system means that a document setting out conventions, working principles and relationships between key institutions of government is of considerable constitutional significance.
 5. The constitutional framework of the Kingdom encompasses the Monarchy, representative democracy and the rule of law. All have been pillars since the Constitution of 1875 and the precise balances between institutions of government have been steadily adapting since then. There have been major changes to the Constitution and related laws in 2010 and these are integrated into this Cabinet Manual, but the new system will continue to evolve by experience and convention.
 6. To assist in discussion about the role of Cabinet in the Legislative Assembly, the Manual is available for members of the Assembly to study. The Cabinet Manual is also of critical importance to the entire Public Service, and particularly to those who will interact regularly with Ministers or with Cabinet as a whole. Senior officials, at least, should have a good understanding of the Manual.
 7. The Manual summarizes the constitutional and legal framework for Cabinet government and sets out the operating procedures by which Cabinet has agreed to work. Although the Manual seeks to reflect the law accurately, it claims no authority to change existing law and it is not of course a regulation or statute. Rather, the Manual is a statement of conventions, principles and processes affecting decision-making by government. For this reason, Ministers expect officials to understand the Manual and to abide by its procedures. Part of the ultimate obligation of all those who exercise public power (including Ministers and officials) is to act in accordance with lawful authority.

8. The Chief Secretary and Secretary to Cabinet is available to advise on the interpretation and application of the Manual – His role is set out in paragraphs 97-102 of this Manual. On matters of law, reference may be made to the Attorney General or Crown Law. As regards the Public Service, the effect of any provisions is a matter for the Cabinet as a whole, and particularly for the Prime Minister as the Chair of Cabinet and political head of the executive.
9. Cabinet may of course amend or alter any of its processes, and the governing practices of any nation can be expected to change over time, especially on a change of Government. This Manual will therefore be updated from time to time to reflect relevant changes. Between revisions of the Manual itself, any alterations to processes will be set out in Cabinet Circulars.

PART 2 - THE KING AND CABINET

10. The Constitution and the laws provide for a constitutional monarchy that operates in a combined executive where no part of government “rules” on its own, and all parts need to act together to ensure lawful, coherent, accountable and responsible government.

THE KING

11. His Majesty the King has two roles, as the Head of State of the Kingdom of Tonga, and as the *Hau 'o e Fonua*, the supreme head of the traditional kingship system of the Kingdom. The Constitution acknowledges that these two roles of the Monarch are combined within the dignity and body of the one person. The form of Government for the Kingdom is a Constitutional Monarchy under His Majesty and successors, as provided under the Constitution.²
12. The Monarch as Head of State (the first role referred to above) may exercise key constitutional functions in accordance with the Constitution, by himself or in Privy Council, including:

By the King alone —

- being Commander-in-Chief of the armed forces of Tonga (cl 36);
- initiating elections for representatives of the nobles and the people to sit in the Legislative Assembly (cl 38);
- calling and dissolving the Legislative Assembly (cl 38);
- making treaties with Foreign States, in accordance with the laws of the Kingdom, appointing diplomatic representatives overseas and receiving foreign Ministers (cl 39);
- bringing matters of concern to the attention of the Legislative Assembly in writing (cl 40);
- assenting to legislation that has been passed by the Legislative Assembly (clauses 41, 56, 67, 68 & 79);
- conferring titles of honour and honourable distinctions (cl 44);
- proclaiming martial law in the event of civil war or war with a foreign state (cl 46);
- appointing and dismissing the Prime Minister (chosen by the Legislative Assembly) and other Cabinet Ministers (nominated by the Prime Minister) (cl 51);
- appointing, on the advice of the Prime Minister, the Governors of Ha‘apai and Vava‘u (cl 54);

- appointing the Speaker of the Legislative Assembly (on the recommendation of the Legislative Assembly) (cl 61);

and also the following functions that are to be exercised by the King and Privy Council —

- appointment of an Attorney General (cl 31A);
 - granting pardons to people convicted of criminal offences (cl 37);
 - hearing appeals from the Land Court (cl 50(2));
 - approving (along with unanimous Cabinet) changes to the Constitution (cl 79);
 - the appointment of Judges after receiving advice from the Judicial Appointments and Discipline Panel (cls 85, 86);
 - approving the terms of leases of more than 99 years (cl 114).
13. All of these powers, and indeed all other powers where His Majesty is acting as Head of State, are exercised within the Constitution, statute law, common law and constitutional conventions.
14. The King's traditional role of *Hau 'o e Fonua* (the second role referred to in paragraph 11 above) has always been in existence, is fundamental to Tongan society and is expressed in a wide variety of ways. One way is in the Constitution which His Majesty King George Tupou I granted in 1875 to the Nobles and People of Tonga. The Constitution protects the Monarchy and its relationship with the Nobility and People by many methods, including the following —
- succession to the throne is determined by hereditary rules and no member of the royal family likely to succeed to the throne may marry without the Monarch's consent (cls 32 & 33); 3
 - Sovereign of all the Chiefs and people (cl 41), the Monarch may grant hereditary estates (cl 104) and confer title and estate upon any person where an estate has reverted to the Monarchy (cl 112); and
 - the person of the Monarch is "sacred" (cl 41), the Monarch's own lands and property may be dealt with as the Monarch pleases (cl 48) and the dignity of the Monarch is protected in several ways in the Constitution.
15. The term "prerogative power" or "royal prerogative" is commonly used to refer to those "governing powers" that originate in the authority of the Monarch, as recognised under the Constitution and common law, that are directly concerned with the functioning of the Executive branch of government. These are functions listed under the first role referred to in paragraph 12 above. In political and constitutional practice in all common law countries including monarchies, these prerogative powers are routinely exercised by Cabinet, Ministers and officials on behalf of the government as a whole (such as the conduct of foreign policy, or the structuring of government ministries).⁴

The Monarch has “personal prerogatives” in relation to the traditional role mentioned in paragraph 14.

THE KING AND PRIVY COUNCIL

16. The Privy Council will now consist of advisors appointed by His Majesty from time to time to advise him on matters general or particular, as His Majesty decides.

In addition, the Constitution establishes as a Committee of the Privy Council, the Judicial Appointments and Discipline Panel, comprising a fixed membership, including the Law Lords appointed from time to time, whose purpose is to advise upon His Majesty’s Judicial related functions (cl 83C).

17. Matters that must be decided by The King in Privy Council under the Constitution are also listed above and include —
- granting pardons to people convicted of criminal offences (cl 37);
 - hearing appeals from the Land Court (cl 50(2));
 - approving (along with unanimous Cabinet) changes to the Constitution (cl 79).
 - the appointment of Judges after receiving advice from the Judicial Appointments and Discipline Panel (cls 85, 86);
 - approving the terms of leases of more than 99 years (cl 114).

In addition, other Acts provide powers and functions for His Majesty, alone or in Privy Council, especially relating to foreign affairs, formal matters and some emergency powers.

18. The Constitution now provides in clause 50A(3) that –
- “The Prime Minister shall regularly and as required report to the King upon matters that have arisen with the government and upon the state of the country.”*
19. The Cabinet will be advised in due course, and from time to time, of the administrative arrangements for the Privy Council.

THE CABINET

20. The Cabinet consists of the Prime Minister and all other Ministers, and is the collective forum for Ministers to make decisions on questions of government policy and administration. In practice, all significant matters are decided by collective Cabinet decision. This operating principle is reflected in clause 51(1) of the Constitution and in section 17(3) of the Government Act, which requires the Prime Minister not to decide “any grave or important matter” without the consent of Cabinet. By convention this requirement for the

consent of Cabinet applies to policy and government decisions, and not to advice the Prime Minister might give to the Monarch on appointments and dismissals of Ministers.

21. The Constitution also gives a number of significant powers of decision either to the Cabinet directly or to the King with the consent of Cabinet, including —
- decisions on the currency of Tonga (cl 45);
 - the determination of the terms of leases of land up to 99 years in length, and the approval of leases of land to religious bodies and on beach frontages (cls 105, 108, 109, 114);
 - approval of government expenditure during emergencies (with a requirement to report to the Legislative Assembly on such decisions – cl 19 (ii)).

In addition, many other Acts provide powers and functions for the Cabinet, including powers to make regulations and other delegated legislation.

PRIME MINISTER AND DEPUTY PRIME MINISTER

22. The Prime Minister is in formal terms appointed and dismissed by His Majesty the King, on the recommendation of the Legislative Assembly as provided in the Constitution and Government Act.⁵
23. As the leading Minister of the Government, the Prime Minister presides over Cabinet. He leads the Government in the Legislative Assembly. He is the principal spokesperson for Government. He also has residual responsibility for the administration of any department or government property not otherwise specifically provided for.⁶
24. The Prime Minister chairs Cabinet meetings. By convention, responsibility for Cabinet procedures rests with the Prime Minister.
25. The Deputy Prime Minister is also formally appointed by the King on the recommendation of the Prime Minister.⁷ The Deputy Prime Minister exercises all powers and performs all duties of the Prime Minister if the Prime Minister is absent, unwell, or otherwise unable to perform the duties of office.⁸

MINISTERS

26. In formal terms, Cabinet Ministers are also appointed and dismissed by His Majesty the King on the recommendation of the Prime Minister. Clause 51 of the Constitution provides that the maximum number of Ministers, including the Prime Minister, shall be fewer in number than half of the number of

elected members of the Legislative Assembly excluding the Speaker – that is twelve including the Prime Minister.⁹

27. The Constitution specifically provides that not more than four Cabinet Ministers may be appointed who are not elected representatives of the Legislative Assembly, and they become full members of the Legislative Assembly – to debate and vote (but not to take part in votes of no confidence).
28. Ministers exercise powers within the Constitution and the law, including —
 - participating in, and supporting, Cabinet decision-making;
 - overseeing and directing the public service in the areas of their portfolio responsibilities;
 - being responsible and accountable to the Legislative Assembly; and
 - making delegated legislation if so empowered by statute.
29. The responsibility of Ministers in the Assembly for government policy as a whole (collective responsibility) and for their own performance in particular (individual responsibility) is a key part of governmental accountability, and is discussed further in Part 4. The Constitution requires Ministers, each year, to prepare a report on the affairs of each Ministry for the King to forward to the Legislative Assembly. The Legislative Assembly may question a Minister on the report and the activities of the department.¹⁰
30. Ministers can also be “impeached” by the Assembly on specified grounds. Although still formally existing with regard to Ministers, for practical purposes the impeachment process for Ministers has been overtaken by other methods of accountability, including the powers of the Assembly to ask questions and to express lack of confidence, and the general operation of civil and criminal law. The impeachment process is likely to be more relevant for the impeachment of elected representatives under clause 75 of the Constitution.¹¹

PART 3 - CABINET'S ROLE IN THE CONSTITUTIONAL SYSTEM OF GOVERNMENT

ALL PUBLIC POWER IS CONFINED BY LAW

31. In 1875 His Majesty King George Tupou I opened the session of the Legislative Assembly to introduce the new Constitution and entrenched freedom, the rule of law and constitutionalism with the following words:¹²

“You are aware that the form of Government in the days past was that my rule was absolute, and that my wish was law... But that appears to me was a sign of darkness and now a new era has come to Tonga – an era of light – and it is my wish to grant a constitution to Tonga and to carry on my duties in accordance with the Constitution and those that come after me; and the Constitution shall be as firm as a rock in Tonga for ever...”

32. The King’s commitment was to “rule in accordance with law”. This same requirement applies also to Ministers, public servants and to all who exercise power under the Constitution and the laws of Tonga. This power to govern Tonga and its people through the Constitution and associated legislation is called “public power”.
33. Cabinet government has its basis in the Constitution’s foundations. The executive power of Cabinet was to be organized as part of the interlocking chain of authority linking the constitutional Monarchy with the Cabinet, the Legislative Assembly, the Public Service and the people generally.
34. Following His Majesty King George Tupou I, the core principle might be stated simply as follows: “Government, from the Monarch down to all officials, is limited by law”. This simple statement underlies the internationally recognised broad principle of the “rule of law”, and is at the heart of Tonga’s Constitution, and is recognised in clause 83A of the Constitution as follows:

“The existing underlying constitutional principles of the Rule of Law and Judicial Independence shall always be maintained.”¹³

35. Core principles, such as freedom under the rule of law, are of course enduring (“as firm as a rock in Tonga for ever”). Also, all societies change over time and it is important for aspects of government to reflect those changes.
36. This Cabinet Manual sets out in simple and clear terms, how those core principles of “government limited by law” apply to the ongoing business of government. First, it is necessary to summarise the legal and other sources of those core principles, and then to spell out how they apply to the Cabinet link in the governing chain.

THE CONSTITUTIONAL FRAMEWORK OF TONGA

37. The rules, processes and institutions that govern the exercise of public power are all regarded as part of the constitutional system. Some parts are more important than others and some rules are more readily changeable than others. However, all are relevant, and if at any time the legality of any public power is called into question, the Courts may explore these sources. The core elements of the Tongan constitutional framework may be found in several sources, such as those described in the following paragraphs.
38. The principal institutions of Tongan government and rights and freedoms of the Tongan people are set out in the Constitution of Tonga that was originally approved by the Legislative Assembly as introduced by His Majesty King George Tupou I in 1875 (the Constitution has of course been amended from time to time in accordance with cl 79).
39. Various Tongan statutes, such as the Government Act 1903 (as amended), Public Service Act 2002 and the Public Finance Management Act 2002, also have constitutional significance as they define some core relationships and processes of government, and therefore affect the exercise of core areas of public power.
40. Some court decisions also form part of the constitutional framework, as they set out important common law rules about the exercise of public power, such as the law of judicial review and the law of the royal prerogative.

CONSTITUTIONAL CONVENTIONS

41. Tongan custom, practice and conventions about government processes, also form an important part of the constitutional framework, and help give it working and practical effect. “Conventions” are particularly important to Cabinet government, defined simply as *the working rules accepted as binding by key constitutional office holders*.¹⁴ Such custom, practices and conventions are usually unwritten (meaning not written in the Constitution). They have developed over time in response to changing circumstances. They help to ensure that the core principles of the formal constitutional documents stay relevant to the practical needs of modern society and government. It is generally agreed that the higher office holders need certainty in their relationships, especially if proper accountability is to be upheld, and political instability is to be avoided. A key purpose of a Cabinet Manual in many countries is to reduce relevant conventions to writing so that they are clear and certain.
42. The conduct of government is also influenced by other rules, including comparative, regional or international rules, laws, agreements or principles that the Kingdom of Tonga has accepted and is a signatory to.

43. The picture is that the Cabinet operates within a web of rules and relationships that shape the conduct of public power. Within that web of relationships, it is of course necessary to be clear on lines of authority and responsibility for decision-making.

THE STRUCTURE OF THE CONSTITUTION

44. There are three parts to the Constitution (as amended), and these are summarised in turn.

45. Part I sets out the Declaration of Rights, and Clause 1 provides that:

Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free for ever. And all men may use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will.

46. In addition, Part I declares the rights of the people of Tonga, including —

- prohibition of slavery;
- freedom of worship;
- freedom of the press;
- freedom of petition;
- habeas corpus;
- rights of due process in the criminal justice system;
- government protection of life, liberty and property;
- taxation by law and parliamentary control over expenditure; and
- various provisions safeguarding the rule of law and the application of one law to all, whether chiefs or commoners, Tongans or non-Tongans.

47. The Tongan declaration of rights in the Constitution of 1875 asserted the priority of human dignity, and preceded the United Nations' Universal Declaration of Human Rights by 73 years. It reflects the spirit of such other declarations in setting out Tonga's constitutional commitment to freedom, to the rule of law and to the democratic principle of control by a parliament over state tax and expenditure.¹⁵

48. In Part II of the Constitution (Form of Government), clause 30 provides that :

“The form of Government for this Kingdom is a Constitutional Monarchy under His Majesty King Tupou VI and his successors.”

49. In addition, Part II of the Constitution sets out the division of the Government of the Kingdom into Executive, Legislative and Judicial powers and duties. These are outlined in turn.

THE EXECUTIVE

50. The Cabinet is the executive branch of government, and in accordance with clause 41 the Ministers are “responsible” in governmental terms. Ministers meet collectively in Cabinet to consider the business of government. They are chosen from amongst the members of the Legislative Assembly, except for any appointed Ministers who, on appointment, become members of the Legislative Assembly.¹⁶

THE LEGISLATURE

51. The Legislative Assembly of Tonga is made up of elected representatives of the nobles, elected representatives of the people, plus any appointed Ministers (up to 4 may be appointed). The King and the Legislative Assembly together have the power to enact laws (cl 56), and the approval of the Legislative Assembly is needed for taxation and customs duties, and for the government’s budget each year. The Ministry and other organs of “government” by statute are also required to report to the Legislative Assembly on various matters. The inter-locking nature of the branches of government is shown by the provision that the Legislative Assembly can usually confirm or rescind any regulation, rule or Order passed by Cabinet or a Minister.¹⁷

THE JUDICIARY

52. The judicial power of the Kingdom is vested in the Court of Appeal, the Supreme Court, the Land Court, and the Magistrate’s Court (cl 84). The Constitution includes clear protection of the independence of the judicial branch and court processes. The judicial power also enables the Supreme Court, if asked to do so, to examine actions by the Cabinet or a Minister or a public official¹⁸ – and to interpret all law in appropriate cases to ensure that it is not inconsistent with the “supreme law” of the Constitution.¹⁹ In all such cases, there can be appeals to the Court of Appeal. For further discussion of the power of judicial review, see paragraphs 151-154 below.

THE SEPARATION OF POWERS

53. Part II of the Constitution therefore sets out the basic structure of government in Tonga. This includes the position of the constitutional Monarch in linking the “political Executive” (Cabinet), with the Legislature; and the distinctly separate role of the Judiciary.

54. Following other parliamentary systems with constitutional monarchies, the broad system of law-makers of Tonga can be seen as comprising the Monarch, the political executive, and the legislators, all acting together.
55. As in other constitutional monarchies, although the framework for the separation of roles and powers is established, the only clear separation applies to the judiciary. The judges are charged with independent application of the law. Between executive and legislative powers there is considerable overlap (as in all parliamentary systems). This does not mean that the functions are the same, nor that the boundaries and powers within them are fixed in stone. Each is essential to the other, as when, in order for the government to have money to spend, the Executive must prepare and present to the Legislature the necessary Bills to authorise taxation and expenditure.
56. The political Executive is responsible for making policy, and administering the public service. The Legislature is charged with making law, including authorising taxation and expenditure.
57. The overall framework is the constitutional monarchy and the branches of government conducting government as a whole. The organisation of the Executive “Ministry” reflects Tonga’s commitment to constitutional monarchy and ministerial responsibility for the daily administration of government. The concept of elections to a Legislative Assembly reflects the core principles of democratic representation of and accountability to the people of Tonga. The independent judiciary reinforces the Constitution’s commitment to the rule of law. The critical point here is that, in 1875, the Constitution laid the basis for judicial checks on the legality of the exercise of public power in appropriate circumstances, including decisions of the Cabinet.
58. Part III of the Constitution, dealing with Land, provides an example of how His Majesty King George Tupou I intended the Constitution to be binding on himself and subsequent Monarchs and Nobles – so that no-one could act except in accordance with the provisions of the Constitution. The relevant clause in 1875 was cl 109, which said –
- “It is hereby solemnly declared by this Constitution that it shall not be lawful forever for any one of this country, whether he be the King or any one of the Chiefs or any one of the people of this land to sell one part of a foot of the ground of the Kingdom of Tonga, but only to lease it in accordance with this Constitution. And this declaration shall be a most solemn covenant binding on the King and Chiefs of this Kingdom, for themselves and their successors for ever.”*²⁰
59. Both versions of the clause illustrate the intention to limit the powers of all future governments, Monarchs and Nobles, and to establish promises in the nature of a social contract or ‘covenant’ with the people.²¹ This Part of the Constitution then goes on to give responsibility to Cabinet, the King in Privy Council and the Minister of Lands for various matters regarding the approval, regulation and registration of leases of land. These provisions reflect the deep importance of land to the people and culture of Tonga.

PRINCIPLES THAT SHAPE CABINET GOVERNMENT

- 60 Overall, a number of key constitutional principles are reflected and affirmed in the Constitution. They form the basis for the conduct of government in the Kingdom of Tonga:
- a constitutional monarchy;
 - the protection of the dignity and person of the Monarch and Royal Family, and the institution of hereditary royal succession;
 - the rule of law (all power is limited by law, and subject in appropriate circumstances to judicial review);
 - the exercise of Royal Prerogatives under the Constitution and the laws of Tonga;
 - the allocation of powers to three branches of government, with the distinct independence of the Judicial branch contrasting with considerable overlap between the Executive and Legislative branches;
 - democratic representation, legislative control of taxation and expenditure, and accountability;
 - the acceptance that protecting freedom is a foundation reason for the constitution of government, and government accordingly has key 'protective' responsibilities to the people and their property; and
 - protection of land and custom.
61. These principles have, over the last century and more, combined with Tongan custom and culture to create the environment in which Cabinet operates. Tonga is simultaneously embedded in tradition and, and is committed like all modern states to striving for better governance, accountability, responsibility and progress.

PART 4 - CABINET, MINISTERS AND PUBLIC SERVANTS

COLLECTIVE CABINET RESPONSIBILITY

62. Although the Prime Minister leads the Cabinet, all Ministers are collectively responsible for policy decided in Cabinet. The doctrine of collective responsibility expects reasonable “unity” (cl 51(1)). This means that members support the final consensus decision even if they initially disagreed with it. In a constitutional monarchy, there are three reasons why this is important —
- presenting united decisions to the Legislative Assembly better assists the requirement of maintaining a majority of votes in the Assembly to support the Cabinet in office;
 - presenting united decisions to the public sector enables officials to implement decisions, certain that the policy is supported by all Ministers; and
 - presenting united decisions to the public allows for democratic and political accountability for the government as a whole to the country, rather than an individual Minister making decisions on his own.
63. Ultimately, exactly how collective responsibility applies will depend on its circumstances, including the judgment of the Prime Minister and other members of the Cabinet. Collective responsibility is fundamental and applies equally to when there are different political views represented in Cabinet. Therefore, there is a need for clear rules about collective responsibility in order to ensure stable government.
64. Collective responsibility means —
- An individual Minister has the right and duty to state views at Cabinet meetings for or against any proposal;
 - In general, Cabinet decisions are made by consensus, and if a decision is taken, each Minister is expected to support the decision in public and in the Legislative Assembly;
 - Should the Prime Minister and Cabinet so decide, a conscience vote may be allowed to Ministers in the Assembly;
 - If a Minister in good conscience is unable to support a decision taken by the Cabinet, the Minister should seek advice from the Prime Minister on an appropriate course of action, which might in some circumstances include tendering his resignation;
 - Ministers should always respect the confidentiality appropriate to collective decision-making;

- Effective decisions about applying the principle of collective responsibility rest ultimately with the Prime Minister;
- An important exception to the principle of collective responsibility to make decisions, is where the law allocates an individual power to make a decision to a Minister. But even here, careful judgment should be exercised so that fellow Ministers are able to support the process, as noted below.

INDIVIDUAL MINISTERIAL RESPONSIBILITY

65. Individual Ministers are responsible in political and legal terms, for the implementation of policy and the exercise of relevant statutory powers and functions within their portfolios. They are also responsible for ensuring that good communications exist with key officials, for the overall performance of the portfolio, and for appropriate professional conduct by Ministers and officials. These responsibilities require understanding of the scope and relevant issues in the portfolio and the ability to state the issues clearly in Cabinet, the Assembly and, when necessary, to the public.
66. There is an important boundary between routine policy within a Ministry (which Ministers should manage as part of their ordinary duties) and matters which should come to the Cabinet for decision. For example —
 - any activities that are likely to be widely controversial or unpopular;
 - a Minister intending to run a national public consultation relating to his portfolio on matters of public interest;
 - reporting on the likelihood or results of major litigation, and lessons learnt; or
 - substantial changing of fees or long standing policy where the authority is exclusively with the Minister.
67. The general statement is that Cabinet expects Ministers to manage their own routine matters and not take up Cabinet's time inappropriately. However, the doctrine of collective responsibility requires Ministers to exercise good judgment so that they consult Cabinet colleagues and bring any new or important policy matters for collective decision, in circumstances where they would have themselves regarded it as appropriate to have been consulted. A slightly different test is for a Minister to ask himself whether the Prime Minister would be surprised if the matter was not brought to Cabinet.
68. The requirement of "good judgment" means that all Ministers have carefully to consider fellow Cabinet Minister's papers and requests, so that collective decision-making is efficient and effective.
69. A Minister's portfolio of responsibilities is formally assigned by the King acting on the advice of the Prime Minister. There should be a formal Gazette Notice by which all Ministerial Responsibilities are set out, and any changes

should also be Gazetted so that all know who is responsible for what – and that no duties are overlooked.

70. Ministers are individually responsible to the Legislative Assembly for their own activities as Ministers and the activities of public servants in their areas of responsibility.
71. Some ministerial portfolios are recognized in the Constitution or statutes, and aspects of the responsibilities of individual Ministers may be defined in law. For example, the Constitution recognizes the offices of —
 - the Prime Minister, and his role as leading Minister of the Cabinet;
 - the Minister of Finance, and the role of that Minister in bringing together the annual budget, or Estimates of Expenditure, and the Annual Statement on Revenue and Expenditure, for submission to the Legislative Assembly;
 - the Minister of Foreign Affairs;
 - the Minister of Lands, and the responsibility of that Minister in overseeing the tenure of lands and the registration of leases;
 - the Attorney General, who is the principal legal advisor to Cabinet and Government, in charge of criminal prosecutions, and to whom many Acts give a role;²² and
 - the Minister of Police.
72. Ministers should carefully consider not only the boundaries between their individual and collective responsibilities, but also the circumstances in which the carrying out of their roles might be the subject of rules of practice or law that should be considered. For example, when Ministers attend regional or international meetings, they represent and speak for the country as a whole within their ministerial responsibility.
73. Of particular importance are portfolios that deal with the administration of the law. Hence the role of the Minister of Police is, in accordance with the Police Act 2010, subject to a clear expectation that the Police Commissioner and the Tonga Police will be independent regarding operational matters from the political leaders of the country. It is not appropriate for the Minister to be involved with or give directions on operational matters of crime enforcement, such as investigation and prosecutorial powers. However, there are circumstances in which the Police Commissioner would be well-advised to ensure that his Minister was at least kept informed of significant developments. On broad policy and budget matters, however, the Minister of Police's role is not circumscribed.
74. The general test for all individual Ministers is that they should focus on ensuring that the government's key policy agenda is well understood, and that steps are being taken to implement it. Also, they should be fully aware of key developments in their portfolios. This requires that Ministers are appropriately briefed on relevant administrative, managerial and operational matters. But

there is always a boundary concerning operational decisions that should be respected to avoid intrusion into the responsibilities of the Chief Executive of the Ministry – the Minister should not decide personal individual matters – he sets the broad policy and ensures that the system is working.

MINISTERS AND PUBLIC SERVANTS

75. The public service is the administrative part of the executive branch of government, and the relationship between Ministers and their Chief Executive Officer(s) and other officials is crucial to successful government. As with all important relationships, effectiveness requires mutual understanding of, and reciprocal respect for, relevant roles in the business of government. This could be achieved by regular consultation between a Minister and his Chief Executive Officer(s), and other senior officials.

The Minister's primary role, together with Cabinet, is to make policy decisions within his responsibilities and the applicable legislative framework. The Chief Executive Officer and officials are then obligated to implement such policy decisions, and administer the relevant laws.

76. The Public Service Act 2002 (PSA) establishes the Public Service Commission as the independent authority responsible for all aspects of the Public Service, in particular to advise Government on the management of the Public Service, with such functions and authority as to —
- *Implement merit based systems to drive a performance centric Public Service (s6(a)(g)(h)(i));*
 - *Recruit; develop; and retain needed employees of the Public Service, including the discipline and grievance dispute of employees; and in particular to assist Chief Executive Officers in the development of line Ministry employee capacity and performance (s6(f)(p)(l)(q));*
 - *Monitor performance through the Chief Executive Officers, including the conduct of inquiries and investigations into the management practices of Ministries; (s6(j)(m)(n));*
 - *HR policy compliance oversight, ensuring the principle based environment of the Public Service is adhered to, including the impartial and professional performance of all employees; (s4C,s6(e)(k)(o)(r));*
 - *Implement ongoing reform and right-sizing of the Public Service in line with government's strategic plans and priority needs of line Ministries (s6(b));*
 - *Consult with Ministers on the overall performance and HR management outcomes of their Ministry (s13B);*
 - *Consult with Ministers on the appointment, performance, and removal of Chief Executive Officers (s13,6(s));*

- *Submit for Cabinet's consideration review of existing policy, or establishment of new policy, to strengthen the performance and management of the Public Service (s6(b));*
- *Report to the Prime Minister on the overall performance and management of the Public Service (s6(c)(d)); and*

The Public Service Commission must report to Cabinet on its activities (s 4A(c) PSA) but generally only interacts with Cabinet regarding broad national policies. If a Minister has a problem with a Chief Executive Officer he would seek assistance from the Commission to resolve that problem.

77. Ministers do not employ public servants directly as clarified below. This establishes and protects the core professional relationship between Ministers and public servants, and protects them from personal obligations and liability. Public servants are required by their terms of employment, (whether by contract or public service employment policies), professional ethics and codes of conduct, and the law, to deliver effective and lawful service to the government of Tonga, and also to the public. In particular, public servants are required to act under the authority of lawful Ministerial or Cabinet decisions and requirements of the Public Service Act 2002. Ministers, in turn, are expected to act lawfully, and to give clear and reasonable direction and instruction in a manner that respects the legal status and professional role of the public service.
78. While it is the duty of a public servant to implement government policy, this should be balanced against another key professional obligation, namely, to offer the best possible advice about policy proposals or other matters. Always, this is done “with respect”. On occasions, such advice might not be what a Minister would like to hear, especially if it seems contrary to what the Minister seeks to achieve. The common requirement for this obligation in parliamentary systems is that public servants should offer “free and frank” professional advice, and then abide by Ministerial or Cabinet directions.
79. The purpose is obviously to enable Ministerial and Cabinet decisions to be taken on the basis of the best professional advice available. Public officials may understandably be nervous about this particular obligation. It is the reciprocal obligation of a Minister to create and sustain conditions of respect that allow such advice to be given, and in particular to ensure that if it is given, it is heard and carefully considered, and that no reprisal action is taken against public servants who give “free and frank” professional advice. A Minister is authorised under his inherent jurisdiction to engage consultants to provide further professional advice, in addition to that given by his officials. However, for the purposes of good governance and efficiency the channels of communication and demarcation of areas of advice should be well understood between the Minister, officials and consultants. Ultimately, the consultant could be integrated to work alongside officials to support the Minister.
80. If a Ministerial or Cabinet decision is still made contrary to the free and frank advice given by the public servant, the public service is expected to

implement such decisions appropriately and fully. However, if a decision or action is unlawful, the universal obligation is to obey the law and not the Minister. If this happens, officials should seek appropriate advice from the Attorney General.

81. All Ministerial action or decision making is subject to review by the Courts, and the law ultimately provides a number of ways to make Ministers accountable for any unlawful actions they are responsible for, including impeachment, dismissal from office, or investigation by the Commissioner for Public Relations, the Anti-Corruption Commissioner or the Police.
82. Public servants must be politically neutral in their professional work, and also in such aspects of their private lives as may affect the perception that they are able to serve the government of the day. They must act in such a way that they and their Ministry maintain the confidence of the Minister and the public.

Ministers should take care to ensure that they do not involve public servants in political activities because that is contrary to the law and could involve the public servant being disciplined or dismissed:

“The Public Service is apolitical, performing its functions in an impartial, professional and competent manner;” (s 4C(a)PSA)

If a public servant chooses to be politically active then he should be advised to resign from the public service.

83. Under the Public Service Act 2002, Chief Executive Officers are appointed by the Public Service Commission, in consultation with the relevant Minister. Under the Act, an employee (other than a daily paid worker appointed by a Chief Executive Officer) is appointed by the Public Service Commission, on advice of the Chief Executive Officer. For the reasons given above, it is important that Ministers are not involved in the actual selection and appointment process. The objective of the appointments process is to achieve a professional public service based on merit, not one with personal loyalties to current Ministers.
84. A public servant may be dismissed by the Public Service Commission for cause under the Public Service Act 2002. Again, it is important for Ministers to be aware of this Act. Dismissal must not be arbitrary, and the law requires clear and objective grounds for dismissal free of interference by the Minister, and also appropriate processes such as natural justice, to ensure that the grounds are accurate, and to withstand court challenge. These are important guidelines. Apart from being unethical, acting contrary to the guidelines will expose the Government to substantial legal liability, including possible payment of damages. There is strong judicial precedent in Tonga on this subject.

MINISTERS, PUBLIC ENTERPRISES AND STATUTORY AUTHORITIES

85. In many areas of public activity the Government has by Act set up separate organizations to deliver and operate essential public and other commercial services. These are not then under the direct control of government and are regulated by statute. These organizations may be either —
- Public Enterprises that are regulated by their Act and by the Public Enterprises Act; or
 - Statutory Authorities that are established and regulated by their Act – examples are - Electoral Commission, Anti Corruption Commissioner.
86. The people employed by these organizations are not part of the public service and they are bound to operate in accordance with the Public Enterprises Act and/or the Act that governs them. These organisations are managed by their respective Boards independent of Government except where an Act provides otherwise – such as to allow a Minister or Cabinet to give the organisation policy directions, or there are statutory obligations.
87. The current Public Enterprises are listed in the Schedule to the Public Enterprises Act —
- Ports Authority
 - Shipping Corporation of Polynesia Limited
 - Tonga Airports Limited
 - Tonga Broadcasting Commission
 - Tonga Communications Corporation Limited
 - Tonga Development Bank
 - Tonga Investments Limited
 - Tonga Post Limited
 - Tonga Power Limited
 - Tonga Print Limited
 - Tonga Timber Limited
 - Tonga Water Board
 - Tongatapu Market Limited.

CONFLICTS OF INTEREST AND CORRUPTION

88. Ministers are expected to devote appropriate time to official business, both as members of the executive and as members of the Legislative Assembly. Holding public office is regarded as a full-time occupation.
89. This general principle is recognized for all holders of public positions in clause 24 of the Constitution, which states that anyone holding government

office needs the consent of Cabinet before they may engage in other employment rewarded by remuneration or in kind.

90. Accordingly, accepting additional payment of any nature whatsoever always risks exposing a Minister or official to allegations of bribery, corruption, or conflicts of interest. Apart from being bad government, there is a risk of criminal prosecution. This is particularly the case if a payment is in any way, directly or indirectly, for doing anything that could be regarded as part of a person's official responsibility. Accepting significant gifts of any sort, including customary gifts, requires good judgment and should be discussed with the Prime Minister, and recorded and may be subject to retention by the State.
91. For the same reasons, Ministers must ensure that no actual or reasonably perceived conflict exists (or appears to exist) between their public duty and their private interests. Private interests that could give rise to conflicts could include, for example, a Minister's business interests, a Minister's family's interests, association with non-public bodies, receipt of gifts or fees. Appearances can be as important as reality in conflict of interest issues, and must be considered in establishing acceptable behaviour.
92. A Register of Ministers' Assets and Interests should be maintained by the Chief Secretary and Secretary to Cabinet, and Ministers should be required to declare any pecuniary interests, such as shareholding in a private company they control or significant assets they own or control.
93. If a conflict of interest does arise, the following measures should be considered —
 - a Minister must declare the conflict, but if it is not serious may still receive information and participate in a decision;
 - if the issue is more serious, a Minister must declare a conflict, and withdraw from receiving any information or participating in a decision, including discussing the matter with those who will be involved in the decision making;
 - responsibility for a decision or proposal may be transferred to another Minister;
 - the Minister may be required to divest himself of the interest that causes the conflict.
94. Which course of action is appropriate will depend on the circumstances, including the nature of the interest involved, and the nature of the decision. Thus, a Minister with a sick child is not likely to be perceived as having a conflict of interest in arguing for better health care services in general. But a Minister with a sick child seeking the specific allocation of funds to allow that child to receive an operation, would obviously have a conflict of interest. It is not possible to cover all circumstances with examples. Broad principles must guide decision-making here. Ultimately, ethical conduct requires consent,

acceptance of the issues, and self-enforcement. Also, the law (including the criminal law) stands behind these principles.

95. In practical terms, Ministers should ensure that any possible conflict of interest is promptly addressed. The Chief Secretary and Secretary to Cabinet should be kept informed and the Prime Minister advised. If in doubt about the appropriate course of action, Ministers should consult the Prime Minister or Chief Secretary and Secretary to Cabinet.
96. There is a somewhat grey boundary between conflicts of interest and corruption. The association between the two means that great care must be taken by Ministers and officials to deal openly with any conflicts of interest.

PART 5 - CABINET DECISION-MAKING

THE CHIEF SECRETARY AND SECRETARY TO CABINET

97. The Policy and Cabinet Office (usually known as “Cabinet Office”), is one of the four divisions that make up the Prime Minister’s Office, whose Chief Executive Officer is the Chief Secretary and Secretary to Cabinet.
98. The Prime Minister’s Office has the principal role in the provision of advice, on a daily basis, to the Prime Minister and Cabinet on the wide range of complex issues that confront the Government – particularly its policy priorities. Issues that governments are required to deal with are often complex or pressing, and require well-founded impartial advice and judgment.
99. The Prime Minister’s Office also provides important advice to His Majesty through the Lord Chamberlain and the Lord Privy Seal. Furthermore the Prime Minister’s Office assists in managing transitions between administrations and supporting continuity of government.
100. In addition the Prime Minister’s Office plays a central role in co-ordinating and leading the work of government departments and agencies, and other entities as appropriate, to ensure that decision making takes account of all relevant viewpoints and that advice is as coherent and complete as possible.
101. Because of these important roles of the Prime Minister’s Office, it is considered important for the Prime Minister’s Office to be headed by one Chief Executive Officer, as overall co-ordinator and responsible directly to the Prime Minister.
102. The Chief Secretary & Secretary to Cabinet undertakes and is responsible for the following functions of the Cabinet Office —
 - i. conducting and maintaining the central decision-making procedures and processes of Cabinet;
 - ii. providing secretariat services to Cabinet and Cabinet committees;
 - iii. attending all Cabinet and Cabinet committee meetings to facilitate and record impartially the decisions taken;
 - iv. maintaining and preserving the records of successive Cabinets;
 - v. co-ordinating and promoting effective relationships between Cabinet and Ministries in providing advice and implementing Cabinet decisions and directives;
 - vi. advising on Ministers’ conduct, public duty, and conflicts of interests.
 - vii. as the senior Chief Executive Officer in the Public Service, co-ordinating Government business with other Chief Executive Officers;

- viii. liaising with the offices of the Governors, Government Representatives, District Officers and Town Officers; and
- ix. contact point between the Prime Minister and Government with communities, including churches, interest groups, business groups, associations, sports groups and others.

CABINET PROCEDURES

103. Cabinet determines and regulates its own procedures but final decisions on procedures rest with the Prime Minister, as Cabinet's chair. In general, decisions are made by consensus as determined by the Chair. It is common for matters on which there is significant difference of opinion to be deferred until consensus develops.²³
104. Cabinet meetings are convened and presided over by the Prime Minister or, in the absence of the Prime Minister, by the Deputy Prime Minister, and in the absence of both, any Minister appointed as Acting Prime Minister.²⁴ Any Minister can request the Prime Minister to call a special meeting of Cabinet. The quorum for a Cabinet meeting to occur is at least 3 (three) members present in addition to the Prime Minister.²⁵

WHAT MATTERS SHOULD GO TO CABINET?

105. Ministers must put before the Cabinet all significant matters of policy, including particularly matters which will or could affect other Ministers or Ministries. Section 15 of the Government Act says in other words that "any important or unusual occurrence that may have taken place" should be reported to Cabinet. Otherwise routine or minor issues within relevant portfolios should be decided by Ministers individually.
106. As a general guide, Ministers should put to Cabinet the sorts of issues on which they themselves would wish to be consulted. For example, the following matters must go to Cabinet —
 - matters that must be decided by Cabinet as a matter of law;
 - matters that might affect international obligations or relations in any significant way, such as proposed Treaties;
 - government budget decisions;
 - proposed Bills or regulations;
 - decisions that have implications for a number of government agencies or ministerial portfolios;

- other significant decisions on matters of policy or administration, or that may involve public interest; and
 - financial matters - dealt with separately in this Manual from paragraph 141.
107. If any Minister disagrees with an action that has been taken, or a view that has been stated in public by a fellow Minister without prior Cabinet discussion, the first Minister may request that the matter be discussed by the Cabinet.
108. Where the law requires that an individual Minister make a decision, the Minister, if in doubt, should seek advice from the Prime Minister or Chief Secretary and Secretary to Cabinet on whether it is still appropriate to put the proposed decision to Cabinet for discussion.

CABINET COMMITTEES

109. Cabinet committees can provide a preliminary forum for more detailed consideration and discussion of issues before final decision-making by a full Cabinet meeting.
110. Cabinet committees derive their power from Cabinet. All Cabinet committee decisions should be reported to Cabinet for confirmation and Cabinet retains the ultimate power of decision, unless the power to make decisions is delegated by Cabinet to a Cabinet committee. Ministers and public servants must not act on Cabinet committee decisions until they have been confirmed by Cabinet.
111. The Cabinet may determine the structure of Cabinet committees and the membership, chair and terms of reference of each Cabinet committee.

CABINET AGENDA AND PAPERS

112. Cabinet agendas and papers must be approved by the Prime Minister, for circulation before Cabinet meetings. In relation to Cabinet committees the chairman of the Cabinet committee approves agendas and papers for circulation.
113. The Chief Secretary and Secretary to Cabinet is responsible for preparing and circulating the agendas and papers for, and arranging meetings of Cabinet.²⁶
114. The Prime Minister may impose and enforce deadlines for this process. Any late papers have to be approved specifically by the Prime Minister, through the Chief Secretary and Secretary to Cabinet, on written application by, or verbal discussion with, the Minister concerned.

115. A Minister may bring forward a paper to Cabinet on a matter within his own area of responsibility. A Minister's paper will not be discussed in the Minister's absence unless the Minister agrees.
116. The Prime Minister will have the authority, in the absence of the relevant Minister, to direct a Ministry, through the Chief Secretary and Secretary to Cabinet, to submit a Cabinet paper when necessary.
117. If a Minister wishes that a matter within another Minister's area of responsibility to be put on a Cabinet agenda, the matter should be first discussed with the responsible Minister, and then approved by the Prime Minister with a direction as to which Ministry should submit the Cabinet paper.
118. It is expected that detailed development or drafting of Cabinet proposals will generally be done and signed by a relevant official, and that Ministers will also sign and endorse the Cabinet paper, including speaking to the paper and answering questions. With the agreement of the Prime Minister, key officials may be invited to the meeting to make a presentation and answer questions on the paper, but shall not be present or participate during the final discussion and decision-making regarding the paper.
119. A Minister who wishes to raise a matter orally in Cabinet, because of great urgency or particular confidentiality, should inform the Prime Minister as early as possible. The Prime Minister also has the authority to enquire to a Minister in Cabinet as to the status or clarification on any matter.
120. This procedure will also apply to meetings of Cabinet committees.

PREPARATION OF, AND CONSULTATION ON, CABINET PAPERS

121. The notes below are intended to ensure that Ministers are presented with relevant and accurate information in a manner that facilitates focused decision-making.
122. Cabinet papers should therefore be succinct and clear in identifying —
 - the issue being addressed;
 - a summary of the decision(s) the paper seeks to obtain from Cabinet;
 - the relevant Government objective;
 - previous Cabinet decisions on or related to the subject-matter;
 - the options available to Cabinet;
 - the relevant considerations in relation to those options, including legal and financial implications;
 - any known views of other relevant Ministers and officials;

- the Ministry's proposal as to what decision Cabinet should make, in the form of specific recommendations.
123. Any draft notices, orders, Bills or other legal documents required to implement a recommendation should be attached to a Cabinet paper in the exact form it is intended they should be approved.
 124. Cabinet papers must be signed by the relevant Minister (or, if he is not available, by another Minister on behalf of the relevant Minister) in order to be accepted on a Cabinet agenda. The Minister who signs the paper is expected to introduce the paper at the Cabinet meeting.
 125. The Minister and officials who prepare a Cabinet paper must consult with all other Ministers and officials to whom the proposals in the paper are relevant and their views must be reflected in the paper. Consultation is particularly important with the —
 - Ministry of Finance, on matters with financial implications;
 - Public Service Commission, on matters regarding public servants;
 - Ministry of Foreign Affairs, on matters of foreign policy; and
 - Crown Law, on matters with legal implications.
 126. It is desirable for Ministers and officials to agree on proposals in Cabinet papers. If there is significant difference of view, such matter should be referred by the relevant Minister to be considered and resolved by Cabinet.
 127. The Prime Minister may decline to accept a Cabinet paper which has not been the subject of proper consultation with other Ministers, even if it has been signed by a Minister.
 128. When a Minister wishes a Cabinet paper to be considered by Cabinet urgently without a Cabinet meeting, he should consult the Chief Secretary and Secretary to Cabinet to obtain the Prime Minister's approval to circulate the Cabinet paper. Once the Prime Minister grants approval for circulation, the Cabinet paper shall be circulated by the Chief Secretary and Secretary to Cabinet amongst the Ministers. If a Minister indicates in the circulation paper that the matter should be discussed, the circulation should cease and the Cabinet paper will be tabled in the next Cabinet meeting.
 129. There should be no need for a Cabinet paper (minus attachments) to be more than 5 pages in length. Only important and relevant attachments should be attached to the Cabinet paper.

ATTENDANCE AT CABINET AND CABINET COMMITTEES

130. Reflecting the doctrine of collective responsibility, it is important for every Minister to play an appropriate part in Cabinet decision-making. All Cabinet

Ministers are expected to attend meetings of the full Cabinet and of Cabinet committees of which they are a member.

131. Where a Minister is in country but has a valid reason not to attend a Cabinet meeting, he shall seek the approval of the Prime Minister through the Chief Secretary and Secretary to Cabinet to be excused from attending.
132. In addition to compliance with any relevant financial or other regulations, any Minister who proposes to travel overseas on official business must obtain written agreement in principle from the Prime Minister, and then present a paper to Cabinet justifying the trip. After the trip has been completed, Ministers must present a report to Cabinet noting the events that took place, commenting on whether the objectives were achieved.

CABINET RECORDS AND DECISIONS

133. The Chief Secretary and Secretary to Cabinet is responsible for ensuring appropriate drafting of the record of Cabinet decisions (by both Cabinet and Cabinet committee meetings), for approval by the chair of the meeting that made the decision, and then for onward circulation to relevant Ministers and officials.
134. Cabinet decisions by the full Cabinet, and Cabinet committee decisions that have been confirmed, or authorized, by the full Cabinet, must be adhered to and implemented by all Ministers and public servants. Such Cabinet decisions may be amended, altered or rescinded at a subsequent Cabinet meeting.
135. Cabinet decisions are to be circulated as soon as possible, but no longer than 3 working days after a Cabinet meeting to those Ministers and public servants to whom they are relevant, for appropriate implementation.
136. The Chief Secretary and Secretary to Cabinet will keep a record of Cabinet decisions that call for action by a Minister or public servant, and their deadlines. The Secretary will try to remind those called on to act of their obligations and will report to the Prime Minister where action does not occur as required. Officials are however expected to 'self-enforce' such obligations and deadlines, and to advise their Minister, and the Secretary, if there are problems in meeting the obligations.

CONFIDENTIALITY OF CABINET DISCUSSIONS AND PAPERS

137. Cabinet is a forum for Ministers to discuss issues candidly, but with civility. The frankness of discussions is protected by the strict observance of confidentiality. Discussions between Ministers about Cabinet business must be conducted so as to preserve Cabinet confidentiality.

138. All Cabinet papers and all Cabinet discussions are confidential unless otherwise decided by Cabinet. It is the duty of each Minister and any officials who may handle Cabinet documents to ensure that they are safely locked up when not in use.
139. The Prime Minister is responsible for representing Cabinet's positions in public, but Cabinet may of course agree to make its decisions public, and agree that relevant Ministers should give press statements or other publicity in areas of their responsibility.
140. When a Minister ceases to hold office, all Cabinet papers must be left with the Ministry. The Official Secrets Act applies to Ministers as it applies to all persons holding office or employment in the government, and carries strong penalties for misuse of or negligent dealing with, confidential official information.

PART 6 - CABINET AND FINANCE

141. The Constitution sets out the basic constitutional principle that it is the democratically elected Legislative Assembly that must approve all taxation and customs duties, and the spending plans of the government. The government also reports to the Assembly each year on the way in which the budget has been spent. The process for seeking approval of the revenue and spending plans of the government is the annual budget, or more formally, the submission of the Estimates of Expenditure to the Assembly.
142. The Constitution gives the Minister for Finance primary responsibility for bringing together the many individual initiatives into an overall budget for the government. The overall budget is considered first by the Cabinet for approval for submission to the Legislative Assembly.
143. The Public Finance Management Act 2002 (PFMA 2002) sets out more detailed rules for this process. Section 9 provides that no public money may be expended unless it has been authorised by an Appropriation Act or is statutory expenditure.
144. Under section 3 PFMA 2002, the Minister for Finance is responsible for the management of public finance. The Minister may delegate any powers to the Secretary for Finance, who is the administrative head of the Ministry for Finance. Under section 45, the Minister may issue 'Treasury Instructions' concerning the proper management of finance for all the public sector.
145. The Constitution (cl 53) also makes the Minister for Finance primarily responsible for presenting to the Assembly on behalf of Cabinet an account of all moneys received and spent during the preceding year. The PFMA 2002 (s 35) makes it clear that financial statements concerning the handling of all public money, as defined, are to be presented by the Minister, and that the Minister must also present to the House the Auditor General's report on them – as gazetted – within explicit timeframes. The Minister is also required (s 36) to publish in the Gazette audited quarterly summaries of receipts and payments of public money. In carrying out these duties, the Minister for Finance is acting on behalf of, and so in consultation with, Cabinet as a whole.
146. Under the PFMA 2002 the Government budget process each year involves several steps —
 - The Minister for Finance prepares a statement of anticipated revenue and anticipated budgetary appropriations and submits it to the Cabinet;
 - In accordance with the Budget approved by the Cabinet each year, the Minister for Finance prepares the Estimates for introduction to the Legislative Assembly for the forthcoming financial year.

In order to support the above steps each year the Cabinet may approve a process and deadlines for Cabinet consideration of expenditure and revenue proposals.

PART 7 - CABINET AND LEGISLATION

147. All Cabinet proposals requiring legislation should follow the process below —
- An initial paper should be presented to Cabinet spelling out the policy objectives to be achieved, the timetable, any relevant budget implications, noting any other matters of relevance to the proposals, and seeking the agreement of Cabinet for specific drafting instructions to be conveyed to Crown Law or authorized external legal drafters;
 - Once the draft legislation is prepared and scrutinized by Crown Law (if drafted externally), the Law Committee or any other body given that role, the matter should be placed back before Cabinet for approval for Acts to be introduced into the Legislative Assembly and subsidiary legislation to be made by the Cabinet, a Minister or other authority.
148. These two key steps (approval of policy, and drafting) mean that Ministries concerned with the preparation and drafting of legislation must therefore take account of —
- the process for Cabinet/Ministers to approve policy proposals and to decide that legislation should be drafted;
 - responsibility for drafting legislation, and the working relationship between departments and the Crown Law Department;
 - matters to be considered when developing legislation, including for example, the need to take into account human rights and other core constitutional principles set out in the Constitution and elsewhere (eg the limitations on retrospective laws, taking of property etc), international obligations, financial implications etc;
 - the process for Ministers and the Cabinet to approve Bills for introduction to the Legislative Assembly;
 - printing and publication obligations on the government; and
 - for subordinate legislation, the process, roles and responsibilities for drafting and for approval by the Minister and Cabinet.

PART 8 - THE EXECUTIVE AND THE ADMINISTRATION OF JUSTICE

THE RELATIONSHIP BETWEEN THE EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT

149. Respect for the rule of law is embedded in Tonga's Constitution, including the establishment of the independent judiciary. It is the responsibility of the courts to determine disputes brought before them, in accordance with the law.
150. It is important for the effective functioning of any system of government that each branch of government recognizes the importance of the separation of public powers between the executive, legislative and judicial branches, and supports the role that each must play. With regards to the relationship between the executive and judicial branches, it is particularly important that actions of the Executive do not undermine, or appear to undermine, the independent administration of justice. This affects the way Ministers interact with all parts of the justice system, from decisions to investigate or prosecute individuals, through to the operation of the courts and the status of judges and of their judgments.

JUDICIAL REVIEW OF MINISTERIAL DECISIONS

151. Under the common law, the courts can exercise "judicial review" of executive government decisions (or refusal to take decisions) to determine whether the decision or refusal is unlawful or invalid. Most executive government decisions are able to be the subject of judicial review.
152. The courts are usually concerned with the process of decision-making rather than the outcome or merits of the decision. The overriding concept of fairness to all affected parties is critical.
153. The grounds for challenge under the law of judicial review can be broadly divided into —
 - illegality (e.g. acting outside the scope of the power; getting the law wrong, taking into account irrelevant considerations or failing to take into account relevant considerations; being motivated by an improper purpose or acting under an invalid delegation);
 - unfairness or procedural impropriety (e.g. breach of natural justice, bias, failure to honour legitimate expectations, lack of consultation); and, sometimes

- unreasonableness (in the sense that ‘no reasonable decision-maker in these circumstances could possibly make this decision’).
154. If a Minister is acting under the authority of a statute that vests the decision in the individual Minister, it must be clear on the record that the Minister personally took the appropriate decision. Ministers and officials should prepare Cabinet papers carefully to reflect this. They should also assume that the papers they prepare would be made available by normal discovery of documents in any court process. Where Ministers are required by statute to make individual decisions, it may be appropriate for the Minister simply to consult Cabinet colleagues on the issues and for any such consultation to be ‘noted’ as opposed to any actual decision from the Cabinet.

ROLE OF THE LAW OFFICERS OF GOVERNMENT

155. The Attorney General is historically the chief legal advisor to the government, although it is common for his advice to be given following more detailed advice from the Solicitor General and Crown Law. Their roles are subject to ancient conventions that allow them to work effectively in ensuring the rule of law and the independent administration of justice.
156. The Lord Chancellor links the Executive and Judicial branches of government, in the responsibility for recommending the appointment of judges (as Chairman of the Judicial Appointments and Discipline Panel), and in ensuring there is sufficient capacity for the administration of an independent system of justice, and also disciplining judges for improper behaviour.

GOVERNMENT AND CRIMINAL PROSECUTION PROCESS

157. It is important that the administration of justice is free from any suggestion of political control or influence, and is seen to be free. It is therefore important that decisions to investigate or prosecute individuals, whether by the Police or other government agencies, are taken independently by the public service office holders. Ministers should be scrupulous in ensuring that their actions or comments could not be taken as seeking to influence such decisions.
158. This principle is most important in relation to the operation of the Police, given their role in upholding and enforcing the law. In general the role of the Minister of Police is restricted to matters of policy in relation to policing, such as the overall level of resourcing and priorities for the police. The Police Commissioner has operational independence in relation to all matters to do with staffing, deployment of resources and the exercise of police powers in individual cases.

MINISTERIAL COMMENT ON COURT PROCESS AND JUDICIAL DECISIONS

159. The same principle that requires Ministers not to involve themselves in deciding whether a person should be prosecuted, also means that Ministers should in general refrain from commenting on the results of particular cases or on particular sentences imposed by a court. In particular, Ministers should avoid commenting while it is still possible that an appeal might be brought.
160. Ministers should always avoid comments that could be taken as being intended to influence the courts in the way they handle future cases. They should also refrain from expressing views publicly that could be regarded as reflecting adversely on the impartiality, personal views or ability of any judge. If a Minister has concerns over a particular decision or the actions of a judge, the appropriate course is to discuss the matter with the Attorney General.
161. It is, however, proper for Ministers to comment on the effectiveness of the law, or about policies on punishment (that is, on those matters where the executive has a proper involvement), in a way that does not call into question the performance of the courts.

MINISTERS AND LITIGATION

162. If proceedings are taken against a Minister, either in person or for the conduct of official functions, no legal representation may be arranged without the consent of the Attorney General and Cabinet. To ensure the protection of the interests of the Crown generally, it is particularly important that advice from the Attorney General is sought if any Minister wishes to be represented as plaintiff in any case.
163. Particular advice should be sought from Crown Law on the procedures that apply when proceedings are brought against Ministers, including —
 - proceedings against the exercise of ministerial powers;
 - proceedings against a Minister personally;
 - indemnities;
 - costs and damages;
 - appearance in court by Ministers and production or discovery of documents; and
 - service of court documents.

PART 9 - MANAGING TRANSITION OF GOVERNMENT

164. The Constitution provides that after a general election, and if elected representatives fail to nominate an alternate Prime Minister after a successful vote of no-confidence, the Ministers are to operate in “caretaker mode” :

“Following a general election, and when appointed under clause 50B(4)(c), Ministers shall be and remain as caretaker Ministers until their appointments are revoked or continued on the recommendation of the newly appointed Prime Minister; and during such period caretaker Ministers shall not incur any unusual or unnecessary expenditure without the written approval of the caretaker Minister for Finance. (cl 51(3))”

165. This caretaker period is a transition phase where the normal business of government continues, but no important or unusual decisions are to be made – the Prime Minister’s Office Circular to Cabinet Ministers and CEOs in government said:

“the normal business of government, and the day to day administration of departments and other agencies shall continue as usual;

decisions taken before the start of the caretaker period will be implemented as required;

during the caretaker period Government Ministries shall consult and are to obtain the written approval of the Hon. Prime Minister and the Hon. Minister of Finance when incurring extraordinary expenses – if absolutely necessary.”

166. Every time that a Minister takes over a new Ministry, or there is a reshuffle of Ministries and responsibilities there is a need to manage the transition of the Minister to his new responsibilities. Similarly but on a much larger scale is the transition of an entire “government”, during which there will be a new Prime Minister and many of the Ministers may be new to Government.

167. At such times it is important that the other limbs of government remain strong and perform their duties —

- His Majesty the King will continue in his role without interruption;
- The Courts and the Judges will continue without any interruption at all;
- the Legislative Assembly membership will change after elections, but all of the internal systems and officers will remain the same so there will be little change or problem, but there will be a greater need to provide Members with information about their role in the Constitutional system;

- for new Ministers this Cabinet Manual should be of great value during their adjustment, as will especially be the assistance of the Chief Secretary and Secretary to Cabinet, and his staff;
- the Public Service is a permanent service so a change of Government will have little impact on the membership of the service but the public servants are likely to have to manage major restructuring as Ministries and responsibilities are re-organized and new Ministers will need guidance and briefings.

APPOINTMENT OF MINISTERS

168. After a general election the Prime Minister may choose 11 other Ministers and between these all of the business of government must be distributed. There may be some restructuring of Ministerial responsibilities and departmental organization, and the incoming Prime Minister may decide to completely alter the Ministries and their responsibilities – either at the outset or by restructuring at a later date.
169. Chief Executive Officers and senior public servants should make themselves available in the days after a Prime Minister is chosen, to assist him and his team, which is likely to include the Chief Secretary and Secretary to Cabinet, to be aware of the many facets of government and how they can be best assigned amongst the new Ministers and the Ministries thus structured.

ASSIGNMENT OF MINISTERIAL RESPONSIBILITY

170. There is likely to be urgency in making these new arrangements because when the King appoints Ministers they are then and there assigned their roles, duties and responsibilities, meaning that all the areas of government business must then be defined and assigned. It is to be expected that there will be loose ends and problems in this process and these should be referred to the Chief Secretary and Secretary to Cabinet who will do what he can to sort them out and refer difficult matters to the Prime Minister and to Cabinet.
171. To assist in this process each of the departments of government should make written handover briefings for the new government that include —
 - their areas of responsibility and main functions;
 - their legislation and policy framework;
 - their plans and goals;
 - the department structure and functions;
 - major on-going programmes;
 - the state of their business and finances.

ESTABLISHMENT OF MINISTRIES

172. As soon as new Ministers are appointed, the appointments of the former Ministers will be revoked, and the Chief Secretary and Secretary to Cabinet will inform the incumbent Ministers in writing of the new appointments and the consequent revocation of former Ministerial appointments (cl 51 of Constitution).

173. The new Ministers, and the Cabinet, must be ready to act immediately.

The briefing documents will be of great help in this regard, as will the various Chief Executive Officers in government who must be ready to fully brief their Ministers, to ensure the government runs smoothly in the meantime.

THE EARLY DAYS OF THE MINISTERS

174. It is likely that new Ministers will have their own agenda for immediate action and so CEOs will need to balance assisting their Ministers whilst ensuring that all procedures are followed and safeguards are maintained so that government remains stable and orderly and lawful.

The terms and conditions of Ministerial office and of benefits and privileges (such as remuneration, leave entitlements, personal assistant, including VIP driver etc) shall initially be advised in writing by the Chief Secretary and Secretary to Cabinet. Ministers will be required to observe the appropriate dress code.

As these policies are devised and reviewed from time to time by Cabinet, Cabinet Circulars will be issued to confirm such matters and also Forms and Guidelines may be included.

175. It is important that the Minister (as advised by his Department) sets his own agenda for action in the early days – rather than merely responding to cases that are thrust upon him.

176. To this end the priority within the Ministry should be, in the first months, to assist the Minister to —

- meet his department officers and get an idea what they do;
- if available, to meet with the previous Minister to receive a briefing and advice on what matters are underway and may be expected;
- meet other government officials whose functions impact on his Ministry;

- meet key stakeholders in his Ministry's activities such as donors, leading private sector representatives, senior staff of related statutory authorities, etc.

CO-ORDINATING THE MINISTRIES

177. CEOs should be diligent during a period of government transition to liaise with each other, both informally and in co-ordinating committees about issues related to the transition, and perhaps 6 months after the changeover, there should be a general workshop of CEOs to evaluate the transition process and to further assist within government to ensure the smooth operation of all facets of government.

ENDNOTES

¹ The original use of that metaphor referred to the Cabinet's connecting role between the Monarch and the Legislature in the United Kingdom. That role is still relevant today in all parliamentary systems.

² Clause 31 of the Constitution.

³ In the event of there being no-one to succeed under the rules, the Nobles of the Legislative Assembly are required to choose who will succeed to the throne and create a new dynasty (cl 32).

⁴ The highest courts in Tonga, the UK, New Zealand and Australia have said that the prerogative of the Monarch in government matters is in reality the ordinary executive power of the state.

⁵ Clause 51 of the Constitution and section 17(1) Government Act.

⁶ Section 17(1) Government Act.

⁷ Section 18(1) Government Act.

⁸ Sections 18(2) & 18(3) Government Act.

⁹ Clause 51(2)(b) "the Prime Minister and Cabinet shall be fewer in number than half of the number of elected members of the Legislative Assembly excluding the Speaker.

¹⁰ Clause 51 Constitution.

¹¹ Clauses 51 and 75. The process of "impeachment" essentially involves accusations of wrongdoing in public office, and is a proceeding taken in the Assembly presided over by the Chief Justice which is rather like a criminal prosecution with members of the Assembly as the jury. This is an historical aspect of the Constitution, reflecting ancient processes. The more likely procedure now for Ministers is that if a Minister is guilty of serious failure in office, he may be dismissed from Cabinet by His Majesty the King on the advice of the Prime Minister, who would consult other Ministers.

¹² The most common source for this quotation is J.S. Neill, *Ten Years in Tonga* 1955, London, p 101, and it has been used in a number of Tongan Supreme Court and appellate cases to stress the constitutional foundations of the rule of law.

¹³ Inserted by Act 39 of 2010.

¹⁴ In other constitutional monarchies, for example, there are conventions relating to the relationship between the Prime Minister and the Monarch, to the operation of Cabinet and to the relationship between the Executive and Parliament. Because the United Kingdom and New Zealand have no written constitutions, these relationships in those countries are governed largely by unwritten conventions (with the help of Manuals such as this). However, the Constitution of the Commonwealth of Australia of 1900 is an example of an old written constitution like Tonga's which states certain formalities but can only operate in practice when certain unwritten conventions are applied.

¹⁵ As parliaments developed in the 18th century, their supporters would call for "No taxation without representation".

¹⁶ Clause 51(6) Constitution.

¹⁷ Section 9 Government Act.

¹⁸ As for example in an action for judicial review.

¹⁹ Clause 82, Constitution.

²⁰ The clause today (amended in 1976) is cl.104, which says - It is hereby declared by this Constitution that it shall not be lawful for anyone at any time hereafter whether he be the King or any one of the chiefs or the people of this country to sell any land whatever in the Kingdom of Tonga but they may lease it only in accordance with this Constitution and mortgage it in accordance with the Land Act. And this declaration becomes a covenant binding on the King and chiefs of this Kingdom for themselves and their heirs and successors for ever.

²¹ Clause 104, of the Constitution today says – “It is hereby declared by this Constitution that it shall not be lawful for anyone at any time hereafter whether he be the King or any one of the chiefs or the people of this country to sell any land whatever in the Kingdom of Tonga but they may lease it only in accordance.....”

²² Clause 31A, Constitution.

²³ Section 14, Government Act states that no resolution is valid unless it has been approved by a vote of a majority of those present by show of hands, but this has been overtaken by the practice of seeking consensus, where possible.

²⁴ Section 13 and 18, Government Act (with addition of Deputy Prime Minister).

²⁵ Section 13, Government Act.

²⁶ Based on section 16, Government Act.